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May 12, 2017

By ECFS

Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: **Lifeline Connects Coalition Notice of Oral *Ex Parte* Presentation; WC
Docket Nos. 17-108, 09-197, 10-90, 11-42**

Dear Ms. Dortch:

On May 11, 2017, John Heitmann and Joshua Guyan of Kelley Drye & Warren LLP met on behalf of the Lifeline Connects Coalition (Coalition) with Dr. Jay Schwarz, Wireline Legal Advisor to Chairman Ajit Pai. In the meeting, we discussed the draft Restoring Internet Freedom Notice of Proposed Rulemaking (NPRM) and the Commission's ongoing commitment to support broadband services through the Lifeline program. In addition, we discussed the upcoming increases in the Lifeline minimum service standards and the current barriers to entry and industry consolidation in the Lifeline program.

Draft Restoring Internet Freedom NPRM

The Chairman has consistently indicated his continued support for Lifeline broadband¹ and paragraph 68 of the draft NPRM proposes "to maintain support for broadband in the Lifeline program after reclassification." The Coalition supports that proposal and urges the Commission

¹ See FCC News Release, Statement of FCC Chairman Ajit Pai On the Future of Broadband in the Lifeline Program, Mar 29, 2017 ("I support including broadband in the Lifeline program to help provide affordable, high-speed Internet access for our nation's poorest families... Going forward, I want to make it clear that broadband will remain in the Lifeline program so long as I have the privilege of serving as Chairman."); Lifeline Modernization Order, Dissenting Statement of Commissioner Ajit Pai, 1 ("[M]odernizing the Lifeline program to support affordable, high-speed Internet access for our nation's poorest families is a worthy goal.").

Marlene Dortch
May 12, 2017
Page Two

to also re-confirm its commitment to its longstanding policy of forbearance from the facilities requirement for Lifeline eligible telecommunications carriers (ETCs) by continuing to support Lifeline broadband services provided by non-facilities-based resellers. Those resellers currently serve the vast majority of Lifeline subscribers pursuant to resale agreements with the mobile network operators (MNOs), which are entered into voluntarily and not pursuant to resale regulatory requirements.

The reference in paragraph 68 of the draft NPRM to Lifeline tracking the support for broadband services in the Universal Service Transformation Order² “‘for the provision, maintenance, and upgrading’ of broadband facilities capable of providing supported services” citing to section 254(e) of the Communications Act of 1934, as amended should not be misinterpreted as a proposal to limit Lifeline broadband support to facilities-based providers. This is because section 254(e) refers to support for both facilities and services and the NPRM language was merely referencing the support for facilities in the Universal Service Transformation Order, which applied to the Connect America Fund, a universal service program designed to support facilities. While the Lifeline program helps to demonstrate demand and return on investment for the facilities that support voice and broadband services, it is not a facilities program. Rather, the Lifeline program addresses affordability, which is why the Commission has a longstanding policy of facilities forbearance in the Lifeline program.

Since 2005, the Commission has granted forbearance from the facilities requirement for Lifeline service providers culminating in the blanket grant of such forbearance in the 2012 Lifeline Reform Order. In that order, the Commission determined that “[r]equiring Lifeline-only ETCs to use their own facilities to offer Lifeline service does not further the statutory goal of the low-income program.”³ To our knowledge, the Commission has never fully reversed a blanket forbearance decision, either granted by the Commission or by operation of law, in order to impose more regulations on some or all market participants. This makes sense, as the

² See *Connect America Fund, et al.*, WC Docket No. 10-90, et al., Report and Order, Further Notice of Proposed Rulemaking, FCC 11-161, ¶ 65 (2011).

³ *Lifeline and Link Up Reform and Modernization, Lifeline and Link Up, Federal-State Joint Board on Universal Service, Advancing Broadband Availability Through Digital Literacy Training*, WC Docket No. 11-42, WC Docket No. 03-109, CC Docket No. 96-45, WC Docket No. 12-23, Report and Order and Further Notice Of Proposed Rulemaking, FCC 12-11, ¶ 377 (2012) (2012 Lifeline Reform Order).

Marlene Dortch
May 12, 2017
Page Three

Commission itself has recognized that “modifying or reversing forbearance once granted . . . should be taken with great care.”⁴

In addition, the language in sections 254(b), (c)(1) and (e), as well as the Universal Service Transformation Order and the decision by the Court of Appeals for the Tenth Circuit upholding that order make clear that the Commission can condition Lifeline support on the provision of broadband services in addition to the deployment of broadband facilities. In *In re FCC 11-161*, the Tenth Circuit held that,

nothing in subsection (c)(1) expressly or implicitly deprives the FCC of authority to direct that a USF recipient, which necessarily provides some form of ‘universal service’ and has been deemed by a state commission or the FCC to be an eligible telecommunications carrier under 47 U.S.C. § 214(e), use some of its USF funds to *provide services or build facilities* related to services that fall outside of the FCC’s current definition of ‘universal service.’ In other words, nothing in the statute limits the FCC’s authority to place conditions, such as the broadband requirement, on the use of USF funds.⁵

With respect to section 254(e), the Court held that the Commission reasonably concluded in the Universal Service Transformation Order that Congress left it the authority to determine the “facilities *and services* for which [USF] support is intended,”⁶ which should include broadband

⁴ See *Business Data Services in an Internet Protocol Environment, et al.*, WC Docket No. 16-143 et al., Report and Order, FCC 17-43 (rel. Apr. 28, 2017) ¶ 174. In the one unique instance where the Commission reassessed a forbearance decision—in the context of a deemed-granted forbearance petition from Verizon related to its enterprise broadband services—it only partially reversed forbearance for the narrowly tailored purpose of ensuring a level playing field among market participants. See *id.* ¶¶ 174, 177. We are not aware of a situation in which the Commission has reversed forbearance in order to create an uneven playing field, tipping the market against some providers (e.g., non-facilities-based providers) in favor of others (e.g., facilities-based providers), at the expense of broadband access, consumer choice, competition, innovation, and similar public interests. In fact, the Commission has recognized that doing so would be contrary to the public interest. See *id.* ¶ 177 (finding that “disparate treatment of carriers providing the same or similar services is not in the public interest as it creates distortions in the marketplace that may harm consumers.”).

⁵ *Direct Commc’ns. Cedar Valley, LLC v. FCC (In re FCC 11-161)*, 753 F.3d 1015, 1046 (10th Cir. 2014) (emphasis added).

⁶ See *id.* (emphasis added).

Marlene Dortch
May 12, 2017
Page Four

service.⁷ The Court further held that the Commission’s interpretation, “acts in a manner consistent with the directive in §254(b) and allows itself to make funding directives that are consistent with the principles outlined in 254(b)(1) through (7).”⁸

Therefore, the relevant provisions of the Communications Act, as well as the language in the Universal Service Transformation Order and the Tenth Circuit’s decision upholding that order give the Commission sufficient authority to support broadband services provided by non-facilities-based resellers pursuant to the Commission’s longstanding grant of facilities forbearance.

Lifeline Minimum Service Standards

We also discussed the need for the Commission to act on the pending petition for reconsideration filed by the Coalition with respect to the minimum service standards set for Lifeline services.⁹ We explained that the upcoming December 2017 increases in Commission prescribed family-sized portions of voice and broadband services threaten the ability of ETCs to make critical Lifeline services affordable for consumers, regardless of the size of their household. As this undermines the purpose of the Lifeline program, we suggested that consumers would be best served by leaving the December 2016 quantitative minimum service standards in place and increasing the qualitative broadband speed standard, which is consistent with Chairman Pai’s priorities reflected in his dissent to the Lifeline Modernization Order.¹⁰

⁷ See *id.* (“[I]t was certainly reasonable for the FCC to have concluded that the language was intended as an implicit grant of authority to the FCC to flesh out precisely what ‘facilities’ and ‘services’ USF funds should be used for.”).

⁸ See *id.* at 1047. It should be noted that one of the principles in 254(b) is that consumers in all regions, including low-income consumers, should have access to advanced telecommunications and information services. See 47 U.S.C. § 254(b)(3).

⁹ See *Lifeline and Link Up Reform and Modernization, et al.*, WC Docket No. 11-42, et al., Joint Lifeline ETC Petitioners’ Petition For Partial Reconsideration and Clarification, 3-7 (filed June 23, 2016) (Coalition Petition for Reconsideration). The Coalition did not seek reconsideration of the first tier of minimum service standards because it was anticipated that those would not render Lifeline

¹⁰ In his dissent, Chairman Pai criticized the minimum speed standard of 3G and called on the FCC to “make sure that Lifeline subscribers have the option to purchase the...4G LTE mobile broadband that many other Americans take for granted.” He argued that the FCC should “at least give low-income consumers the option of directing their Lifeline subsidy to the higher-

Marlene Dortch
May 12, 2017
Page Five

Specifically, the Commission could require wireless Lifeline providers to make available broadband services on 4G LTE networks and others offering broadband speeds to all Lifeline subscribers. The speeds that each consumer experiences will depend upon his or her choice of plan and wireless device. Wireless Lifeline providers will make available to consumers devices that include those that are 4G LTE and/or Wi-Fi capable (consumers can also bring their own). The speeds consumers experience will depend on the device they choose (whether free, purchased or bring your own device (BYOD)).

This proposal maintains the current technology neutral approach and ensures that consumers have access to advanced wireless service offerings including those that leverage unlicensed spectrum. This technology neutral approach also will ensure that consumers can choose among – and ETCs can choose to offer and compete with – service plans that include traditional cellular data and/or premium Wi-Fi and other networks leveraging unlicensed spectrum. The Commission should let consumers choose from competing ETCs for the devices and service plans that best suit their needs.

Lifeline Market Entry and Consolidation

To ensure greater competition and innovation in the Lifeline marketplace, we reiterated our longstanding request that the Commission place all Lifeline related matters on streamlined review, as the perpetual logjam of undecided applications for review and ETC designations, compliance plans and other transaction-related approvals, have created a climate of regulatory uncertainty so morose that it threatens the health of the few Lifeline service providers actively engaged in distributing Lifeline services to eligible consumers.¹¹ Attracting investment to enroll Lifeline subscribers is exceedingly difficult in this regulatory environment and that reality is being reflected in the downward trajectory of the number of low-income Americans being served by the program, particularly in the states where no additional funding is available.

speed services.” *See* Lifeline Modernization Order, Dissenting Statement of Commissioner Ajit Pai at 210.

¹¹ *See* Coalition Petition for Reconsideration at 17-19.

KELLEY DRYE & WARREN LLP

Marlene Dortch
May 12, 2017
Page Six

Pursuant to Section 1.1206(b) of the FCC's rules, this letter is being filed electronically.

Respectfully submitted,



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cc: Dr. Jay Schwarz